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No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,
Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioner's request for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. *The Facts*

This is a suit by an infant child and her parents, the Kollers, against petitioner, Richardson-Merrell Inc., alleging that the child was born without arms and legs

because of her mother's ingestion during pregnancy of defendant's product, the drug Bendectin. Nearly three years after the suit was brought, and shortly before trial was scheduled to begin, petitioner moved for sanctions against the Kollers' primary counsel, Messrs. Allis and Butler, alleging two discrete acts of misconduct. The trial was then postponed indefinitely, and for the next eleven months the case changed from an inquiry into petitioner's alleged wrong to a massive inquiry into the conduct of Allis and Butler. This diversion entailed extensive discovery and several days of hearings, through which the court and petitioner became privy to "the minute details" of innumerable communications between plaintiffs and their lawyers, and between various of the plaintiffs' lawyers. Pet. App. 48a.

From the record amassed in the proceedings concerning the alleged misconduct of Allis and Butler, the material facts emerged undisputed. The undisputed evidence relating to Allis' conduct is summarized in detail in the opinion of the Court of Appeals. Pet. App. 5a-17a, 41a-48a. In brief that evidence shows the following: Allis learned that his secretary had told another employee of his law firm that the defendant in the *Koller* case was offering her financial inducements and harassing her in an effort to get her to sign a false statement that Mrs. Koller had admitted not taking Bendectin during the first trimester of her pregnancy. Upon learning this information, Allis contacted his secretary, who was then on maternity leave; she repeated the same thing to him, and indicated her willingness to sign a statement to that effect. Allis learned that his secretary had also told the same thing to one of her close personal friends.

Allis drafted a short statement based on what his secretary had said to him and, accompanied by an investigator regularly employed by his firm, proceeded to his secretary's apartment for the purpose of asking her to review and sign the statement. With minor changes and

corrections, Allis' secretary signed the statement, the substance of which is set out verbatim in the Court of Appeals' opinion. Pet. App. 9a-10a. Unbeknownst to his secretary, Allis and the investigator tape-recorded the conversation so that there could be no question as to what was said. A transcript of the tape is in evidence and shows that, in the words of the Court of Appeals, Allis' secretary "once again repeated the story she had related to Allis earlier that defendants were trying to induce her to sign a false statement about Mrs. Koller, and she confirmed her willingness at the time to sign a statement for Allis describing those inducements". Pet. App. 6a-7a.[1]

Allis had ample reason to believe, and did in fact believe, that Mrs. Koller had taken Bendectin during the critical period of her pregnancy and that she had never told his secretary the contrary. Indeed, the tape of the meeting with Allis' secretary reflects that, prior to signing the statement, Allis' secretary explicitly and repeatedly affirmed that she had never had such a conversation with Mrs. Koller. Pet. App. 7a-9a n.12. There is no dispute that the substance of the statement that Allis obtained from his secretary—*i.e.*, that she had not heard

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[1] The Statement of the Case in the petition (pp. 7-8) relies heavily upon testimony petitioner (defendant) later elicited from Allis' secretary. As the Court of Appeals explained, Pet. App. 14a & n.27, 49a, the secretary's credibility had been gravely impeached (*inter alia* by the fact that she was receiving financial benefits from defendant), the defendant advised the district court that it was not relying on her testimony in seeking Allis' disqualification, and the district court viewed her testimony as not material to the resolution of the disqualification motion.

Among the "facts" that the petition (at p. 8) asserts (solely on the word of the secretary) is that Allis obtained his secretary's statement by promises of benefit. The district court made no finding that there were such promises, and indeed made no reference to any such alleged promises in its opinion. The state of the record on this subject is described in the Court of Appeals' opinion at Pet. App. 45a-47a.

Mrs. Koller say that she did not take Bendectin, and that defendant had promised her considerable financial benefits if she would sign a statement saying that she *had* heard Mrs. Koller say that—was precisely what the secretary had voluntarily told Allis, as well as others, more than once that very day.[2]

The undisputed evidence relating to Butler's conduct is also summarized in detail in the opinion of the Court of Appeals. Pet. App. 17a-20a, 50a-52a, 54a-55a. In essence, that evidence shows the following: Butler sent to the Commissioner of the Food & Drug Administration fourteen case histories involving mothers who had taken Bendectin while pregnant and then given birth to severely deformed children. In a cover letter to the Commissioner, Butler stated that these case histories together with other information already in the FDA's possession "seems to me to demand an immediate review by the Food and Drug Administration to take this noxious drug off the market before it can do any more harm." JA 1513.[3] Butler sent copies of his letter and of the enclosed case histories to Morton Mintz, a reporter for the *Washington Post* who for many years had covered the drug industry and the FDA, and who had published at least eight previous by-line articles about Bendectin. Butler's letter to Mintz did not discuss the *Koller* litigation but rather stated that "I have known and admired your articles on the drug industry and I thought that these [enclosures] might be of particular interest to you." JA 1515.

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[2] There is a dispute in the testimony as to whether, at the time he obtained the statement from his secretary, Allis believed that his secretary had already given to defendant a statement such as she claimed defendant was seeking from her. See Pet. App. 17a & n.34. The district court in its opinion made no express finding on this point, but did describe Allis' conduct as seeking a "retraction" (Pet. App. 74a, 75a, 76a).

[3] "JA" citations are to the Joint Appendix in the Court of Appeals.

Some of the case histories sent by Butler to the Commissioner and Mintz had been excluded from evidence in the *Koller* case in a pretrial evidentiary ruling by the district court. The district court had not ordered this excluded evidence to be sealed nor issued any protective order barring public disclosure of the evidence. At the time the letters to the Commissioner and Mintz were sent, no jury had been selected in the *Koller* case and the trial was expected to commence within a period of a few weeks. The only direct evidence respecting Butler's motivation was contained in two affidavits submitted by Butler to the district court. As summarized by the Court of Appeals, Butler testified as follows (Pet. App. 19a-20a):

> . . . Butler denied any intent to influence the jury in circumvention of the January evidentiary rulings. J.A. 271, 273-74. Butler stated as his sole motivation that over two years of research on Bendectin had convinced him that it was a dangerous drug that should be taken off the market without further delay. Apparently as an explanation for the particular timing of the release on January 28, he averred that not until January had he received authorization from the parents to release the information to the FDA and the press. J.A. 273.

Butler did not testify in open court, although the district court suggested he might do so.

After receiving the letter from Butler, Mintz contacted Butler for an interview. Mintz also interviewed representatives of petitioner. The only indication in the record as to the substance of the interview with Butler is the content of the article that Mintz subsequently published. That article made no mention of the excluded case histories; the article did refer to "14 cases," a reference to seven cases where lawsuits had been filed and seven other cases where "[l]awyers have been retained." JA 1516. The only references to the *Koller* case in the article, apart from two sentences of non-controversial de-

scriptive material about the Koller child, were attributed to "a company spokesman": "there is no evidence that it caused Anne Koller's birth defects"; "there is a serious question when Mrs. Koller may have taken Bendectin." JA 1516. The remainder of the article was a balanced description of the varying positions of the FDA, the Public Litigation Health Research Group, Butler, and the petitioner respecting the dangers of Bendectin.

At 10:00 a.m. on the day Mintz's article appeared, petitioner filed in the district court a fully prepared motion, with extensive supporting papers, seeking sanctions against Butler.

B. *The District Court's Opinion*

At the culmination of the inquiry into the conduct of Allis and Butler, the district court issued an order disqualifying Allis, Butler, and their law firm from representing the plaintiffs in the *Koller* case. In so ruling, the court made no finding that either Allis or Butler had violated any ethical standard. Nor did the court find that the actions of these lawyers would in any way interfere with the ability of the court to conduct a fair trial in the *Koller* case. Rather, because Allis and Butler were appearing in the case on the basis of a *pro hac vice* admission, the court believed it had the power to revoke their appearances—and thus to deprive the Kollers of the counsel of their choice—without any finding that the lawyers had committed a defined act of wrongdoing. The court reasoned that because "an attorney's admission pro hac vice in a case is the granting of a privilege and not a right[,] . . . the revocation of pro hac vice admission . . . is in the sound discretion of the court." Pet App. 74a-75a. Accordingly, the court held that "conduct which may fall short of a violation of a Disciplinary Rule of the Code of Professional Responsibility may be sufficiently impermissible to warrant the . . . revocation of an attorney's pro hac vice appearance." Pet. App. 75a.

Pursuant to this broad assertion of power, the district court faulted Allis for "preparation and procurement" of the written statement of his secretary. Pet. App. 75a. The fault, as found by the court, was that Allis "zealously pursue[d] the interest of his clients" while neglecting his "duty and ethical obligation . . . to investigate whether Cynthia Koller was committing a fraud upon the court thereby making the suit worthless and a waste of judicial resources." Pet. App. 76a. The court believed that Allis had a duty to the court to investigate a possible fraud by his client—even though the court did not find, and the evidence would not have supported a finding, that Allis lacked a reasonable basis for believing in the good faith of the Kollers' claim. That duty, the court stated, obliged Allis to abandon "pursuit of protecting the interests of his clients" in favor of "an investigation where the objective is to ascertain the truth and thereby to assist in preventing any acts of fraud upon the court." Pet. App. 77a. Accordingly, the court concluded, Allis' failure to so abandon his clients' interests—his preparation and procurement of the statement from his secretary—"can be characterized as an attempt to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients." Pet. App. 77a.[4]

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[4] The court cited four specific considerations as making "evident" the "impropriety of Allis' conduct", expressly refusing to "accept[]" the testimony of two experts in legal ethics (David Austern and Thomas Lumbard) that Allis' conduct was proper. (Pet. App. 76a). Those four considerations were:

(1) "Allis' collaboration with [the investigator] to surreptitiously record a portion of his conversation with [his secretary]." *Id.*

(2) "Allis' testimony under oath that he had no intention of informing the Court of the findings of his 'investigation'." *Id.* [Allis' actual testimony was that at the time he prepared and ob-

With respect to Butler, the district court concluded that the release of information to Mintz was a "flagrant circumvention" of the evidentiary rulings of the court. Pet. App. 77a. The court stated that "Butler's refusal of the Court's suggestion that he explain his actions during the hearings merely buttress the Court's conclusion that his release of the [case histories] to the media was calculated to prejudice the defendant's case and circumvent the Court's prior rulings." Pet. App. 78a.

C. *The Opinion of the Court of Appeals*

The *Koller* plaintiffs, as well as Allis, Butler and their law firm, took an immediate pretrial appeal from the district court's disqualification order. The Court of Appeals reversed that order.

At the threshold, the Court of Appeals determined that orders disqualifying counsel in civil cases are immediately appealable under the collateral order exception to the final judgment rule. In reaching that determination the Court carefully considered this Court's decision in *Flanagan v. United States*, —— U.S. ——, 104 S. Ct. 1051 (1984) (holding that a disqualification order in a criminal case is not immediately appealable), and decided that the factors that led to the result in *Flanagan* are not present in civil cases.

The court then rejected the critical premise of the district court's holding: that, under the applicable local rules of court, "*pro hac vice* counsel, once admitted, are subject to disqualification more readily than regularly admitted counsel." Pet. App. 34a-35a. "Particularly in the federal courts of the District of Columbia, we think it would be unwise to introduce into litigation an unwarranted disadvantage against parties with non-resident counsel by subjecting that counsel more readily to removal." Pet. App. 35a.

The Court of Appeals proceeded to consider whether "the conduct of Allis and Butler provides adequate grounds for disqualification under the standards applicable to regularly admitted attorneys." Pet App. 37a. In this connection, the court, agreeing with the approach of the Second Circuit in *Board of Education of New York City v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), stated the following guiding principles (Pet. App. 38a-39a, and n.49):

> We agree that disqualification is warranted only rarely in cases where there is neither a serious question as to counsel's ability to act as a zealous and effective advocate for the client, . . . nor a substantial possibility of an unfair advantage to the current client because of counsel's prior representation of the opposing party . . . or prior responsibility as a government official . . . Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of

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tained the statement from his secretary, he had not yet determined what use he would make of it. J.A. 946-47, 966-67. See Pet. App. 43a. The petition notes (at p. 8) that the day after the statement was obtained, a copy was mailed by plaintiff's counsel to the court. The petition does not mention that the morning after the statement was obtained, plaintiffs' counsel received a copy of a letter from defendant's counsel to the court declaring that Allis' secretary had told defendant's counsel the *Koller* case was fraudulent, and that the secretary's statement was sent to the court in response to that letter. Pet. App. 11a-13a.]

(3) "Allis' failure to read the prepared statement line-by-line to [his secretary] to ensure that she understood the contents of the statement before signing." Pet. App. 76a-77a. [The undisputed evidence—the tape of the meeting at which the statement was signed—reflects that the secretary read the statement and made changes and corrections and that the statement was consistent with what the secretary had stated orally before signing. J.A. 1477, 1479-81, 1488, 1493-95. See Pet. App. 9a n.12, 43a].

(4) "Allis' procurement of the statement irrespective of the erratic behavior displayed by [his secretary] during his visit on December 27." Pet. App. 77a.

her choice are ordinarily available to deal with ethical improprieties by counsel.[49]

[49] For example, the court may issue a formal reprimand or, in more serious cases, a contempt citation either during or after the proceedings; it may also refer possible ethical improprieties to the disciplinary bodies of the local bar or, in the case of attorneys admitted *pro hac vice*, to the bar of the attorney's home state.

Applying these principles to the case at hand, the court concluded that, given the totality of the circumstances Allis had encountered, his actions "did not constitute misconduct." Pet. App. 47a-48a. The court reasoned from the following basic premise (Pet. App. 39a-40a):

> Counsel in both criminal and civil cases frequently face situations in which there is some evidence tending to cast doubt upon the credibility of the client or the validity of the claim. Yet the adversary system is based on the premise that the truth is better ascertained in such instances through the zealous and competent presentation by each side of its strongest case. The fundamental obligations of an attorney to his client—the bedrock principle of the adversary system—does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud. The attorney's duty to the client is, of course, not without limits. In the familiar words of Canon 7 of the Code, "[T]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*," EC 7-1 (emphasis added). The legal profession continually struggles to define the point at which the attorney's basic loyalty to the client must give way, for that point is very much at the heart of the adversary system.

The court determined the locus of that point by reference to the Disciplinary Rules of the Code of Professional Responsibility. Those rules, which the court quoted

at Pet. App. 40a, require an attorney to act contrary to his client's interests only if he "knows or it is obvious" that evidence is false, or if he "receives information clearly establishing that . . . [h]is client has . . . perpetrated a fraud." The court reasoned (Pet. App. 40a-41a):

> The Disciplinary Rules require objective and informed recognition by an attorney that specific evidence or a client's claims are fraudulent before imposing on the attorney an affirmative obligation to take actions that may be contrary to the interests of the client. An attorney faced with a potential conflict between the duty to the client and the duty not to perpetrate a fraud on the tribunal is entitled to rely on the standards of the Code of Professional Responsibility and should not be disqualified for conduct that falls within the general ambit of those provisions but does not violate the Disciplinary Rules. To permit disqualification for purported misconduct that falls short of a violation of these standards might well penalize conduct that could reasonably be deemed mandatory in fulfilling the duty to pursue zealously the interests of the client.

The court proceeded to evaluate Allis' conduct under the objective requirements of the Disciplinary Rules. In so doing, the court accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case. The court concluded (Pet. App. 42a, footnote omitted):

> In the absence of any finding—or indeed any evidence—that Allis knew or that it was obvious that [his secretary's] claims to him were false or his clients' case fraudulent, we can find no impropriety in his visit to [his secretary] for the purpose of obtaining a "retraction" of any damaging and, according to Allis' belief, false statements made to the defense.

With respect to Butler, the Court of Appeals again accepted for purposes of its analysis the factual findings of the district court.[8] Although the district court had not found Butler to have violated any ethical standards, petitioner argued that the Court of Appeals should find that Butler's conduct violated Cannon 20, District of Columbia Code of Professional Responsibility DR 7-107 (H), which deals directly with press comments by counsel in civil cases. The Court of Appeals noted that there are substantial arguments against an interpretation of Canon 20 that would prohibit Butler's conduct, and that significant constitutional issues would be raised by a proscription of communications relating to issues of much broader public importance than simply the outcome of a particular trial—*e.g.*, whether the Food and Drug Administration should ban a drug from the market. Pet. App. 54a & nn. 65, 66. But, applying the general guidelines the court had previously set forth, the court found it unnecessary to decide whether Butler had violated Canon 20 (Pet. App. 56a, 71a):

> While Butler's decision to release the [case histories] to the press precisely when he did is not to be applauded, we do not believe that this record could support a finding that his conduct was likely to infect future proceedings. Under these circumstances, we cannot approve his disqualification, with the attendant prejudice to his clients, on the basis of this episode.

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[8] The court expressed doubt "as to the basis for the [district] court's finding that Butler's intent was to 'prejudice the defendant's case' and circumvent the [district] court's evidentiary rulings." Pet. App. 51a. But the court accepted that finding for purposes of its analysis. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Depriving a party in a civil case of the counsel of its choice is a serious matter. As the court below noted, "[t]he tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponents has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary." Pet. App. 27a. The Court of Appeals' opinion is a well-considered, measured treatment of the competing interests in protecting the integrity of the judicial process and preventing abusive use of disqualification motions. The legal standard applied by the Court of Appeals is consistent with that of other circuits. And the application of that standard to the material facts here—which are undisputed—is unexceptionable. None of petitioner's challenges to the Court of Appeals' decision merits plenary review by this Court.

The first three questions presented in the petition raise issues that are not in fact posed by this case and/or have no serious claim to the time and attention of this Court. See pp. 14-20, *infra*. Nor is there reason for this Court to address at this time the fourth question presented—whether an order disqualifying counsel in a civil case is subject to immediate appeal. On that question, the decision below is in line with the uniform view of the ten other circuits that have addressed the issue. And that uniform view is not inconsistent with this Court's resolution, in *Flanagan v. United States*, —— U.S. ——, 104 S. Ct. 1051 (1984), of the quite different question whether the pretrial disqualification of defense counsel in a criminal case is immediately appealable. On the contrary, because of fundamental differences between criminal and civil litigation, the controlling factors identified in *Flanagan* dictate that disqualification orders in civil cases are collateral orders that are immediately appealable. See pp. 20-26, *infra*. Moreover,

as the court below pointed out (Pet. App. 27a, 57a), unlike in the criminal area, the failure to permit immediate appeals of disqualification orders in civil cases would lead to massive disruption and delay of civil proceedings. See pp. 26-27, *infra*.

ARGUMENT

1. Petitioner's first and third questions presented may be efficiently addressed together. The first question asks: "If a Federal District Court finds that an attorney has been guilty of misconduct in a case pending before it, may it disqualify the attorney from further participation in the case?" Contrary to petitioner's premise, the District Court did not find either Allis or Butler "guilty" of any violation of ethical standards. See *supra* at 6. And, the Court of Appeals concluded, based on the District Court's findings of fact and undisputed record evidence, that Allis' "actions . . . did not constitute misconduct." Pet. App. 48a; *supra* at 10-11. As to Butler, the Court of Appeals found it unnecessary to determine whether his conduct constituted misconduct. See *supra* at 12. The court's disposition of petitioner's quest to disqualify Butler raises the only legal issue even remotely related to petitioner's first question presented: whether the court below applied the correct legal standard in determining that even if Butler's conduct were ethically improper it would not provide a basis for his disqualification. That issue is also apparently the issue intended to be raised by petitioner's third question presented.

The court below did not hold—as petitioner's first question presented implies—that attorney misconduct cannot be a basis for disqualification from further participation in the case. Nor did it hold that the circumstances enumerated in the third question presented could not be the basis for such disqualification. Rather, the court set forth general standards for determining *when* attorney misconduct may be found to justify disqualification, and concluded that on the undisputed facts of this case those standards precluded disqualification of Butler even if his conduct amounted to misconduct.

The court noted that certain ethical violations by their nature "'taint the underlying trial,' by disturbing the balance of the presentations . . ." Pet. App. 38a. The court put into this category a conflict of interest between current clients, the possession of privileged information concerning an adverse party as the result of a prior representation, prior work on the same or a related matter as a government official, and the likelihood that a lawyer would or should be called as a fact witness in the main case. Pet. App. 36a-38a. As to this category of misconduct, the court below made clear that trial courts have a broad discretion, and sometimes a mandate, to disqualify counsel. Pet. App. 36a. But the court found that as to other forms of misconduct, "[e]xcept in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client's interest than disqualifying the counsel of her choice are ordinarily available." Pet. App. 38a. In the latter connection, the court pointed to the powers of courts to issue sanctions from formal reprimands to contempt citations, and to refer ethical improprieties to disciplinary bodies of the appropriate bar for sanctions ranging up to suspension and disbarment. Pet. App. 38a-39a & n.49. The court placed the alleged misconduct of Butler in this second category, and determined that there was no basis in the record for determining that his "misconduct"—if such it was—was "likely to infect future proceedings." Pet. App. 56a, 71a.[6]

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[6] The court explained that *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied sub nom. Matzner* v. *New Jersey*, 393 U.S. 924 (1963), is consistent with its holding, because the findings in *Kavanaugh* were that the attorney had manifested an unwillingness to "'stay in bounds'" during the future course of that case, "and that subsequent disciplinary proceedings would be inadequate to protect the integrity of the judicial process." Pet. App. 56a.

The legal standards thus applied by the court below do not warrant review by this court. These standards are in accord with those adopted by the Second Circuit in *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979), see Pet. App. 37a-38a, and no other circuit has adopted a contrary rule.[7] The standards are well-calibrated on the one hand to protect the integrity of the judicial process, while on the other hand to guard against the evils that would result from an unnecessarily broad power to disqualify counsel. Those evils, as pointed out by the court below and as illustrated by the instant case, are: needlessly depriving a party of the counsel of its choice; encouraging the tactical abuse of motions to disqualify as a means to delay and disrupt civil litigation; and encouraging the abuse of motions to disqualify

[7] None of the decisions of other circuits cited in the footnotes on pp. 15-16 of the petition conflicts with the standards applied by the court below. All of the decisions in the first footnote, and the first two decisions in the second footnote, involved situations of the first category described by the court below—situations which by their nature "taint the underlying trial" and which the court below held warrant, if not require, disqualification. Two of the decisions in the second footnote fall into the second category, but there was a determination in each that the misconduct was likely to be repeated in the future course of the proceedings. *United States* v. *Dintz*, 538 F.2d 1214, 1222 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Laughlin* v. *Eichler*, 145 F.2d 700, 702 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 866 (1945). In the remaining appellate decision cited in the second footnote, *Viereck* v. *United States*, 130 F.2d 945, 961-62 (D.C. Cir. 1942), *rev'd on other grounds*, 318 U.S. 236 (1943), the D.C. Circuit affirmed a conviction although one of the defendant's two trial counsel had been ejected from the courtroom in mid-trial for egregious misconduct. The court's holding was that, as defendant had been represented throughout by an additional lawyer as well, there was no prejudice warranting reversal of the conviction. In a *dictum*, the court stated that "[i]t appears" that the ejection was "perfectly proper." That 42-year-old *dictum* does not, of course, create a "conflict" among the circuits; it was uttered by the same court as rendered the decision below, and was disapproved in the decision below as inconsistent with the current case law. Pet. App. 37a n.48.

as a means to probe into the confidential communications and strategies of an adversary. Pet. App. 27a, 57a.

2. In support of the first part of the second question presented, petitioner claims that "the court below brushed aside the clearly erroneous rule" by "freely ma[king] factual findings different from those made by the district court." Pet. at 17. But petitioner's characterization of what the Court of Appeals did is simply incorrect. The court below explicitly recognized that "we are bound to accept the [district] court's findings on disputed issues of fact unless they are clearly erroneous." Pet. App. 34a. And the court was meticulous in following that rule throughout its opinion; the court accepted for purposes of its analysis all of the district court's findings of fact, and made additional findings of fact only when the evidence was undisputed. See, e.g., Pet. App. 5a n.6; 6a nn.9, 11; 14a n.27; 17a n.34; 42a-44a; 71a.

Petitioner's asserted violations of the clearly erroneous rule do not bear analysis. Thus, while the Court of Appeals questioned the district court's finding that Butler had acted with intent to circumvent the court's evidentiary rulings and prejudice the defendant's case, the Court of Appeals did not set that finding aside but rather accepted it as the premise for analysis. Pet. App. 51a-53a. And, petitioner lifts out of context the court's statement that Allis' taping of the conversation with his secretary "can be more easily understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation,'" Pet. App. 47a. Petitioner ignores that the Court of Appeals had already concluded, as a matter of law, that Allis had no obligation to conduct a "true investigation" in the sense that the district court meant it—*i.e.*, an investigation into whether his own client was committing a fraud. See pp. 10-11, *supra*. Similarly, petitioner misses the point in its reference to the court's *legal* conclusions that, under the standards of law set forth in the opinion,

Butler's conduct could not furnish a basis for disqualification (Pet. App. 56a) and "Allis' actions . . . did not constitute misconduct and do not justify his disqualification from further representation of plaintiffs." (Pet. App. 47a-48a).

The issue petitioner seeks to raise regarding the clearly erroneous rule is simply not presented by this case. And, even were this not so, the issue is not one worthy of this Court's plenary consideration.

3. In support of the second part of the second question presented, petitioner claims that "the court below brushed aside . . . the abuse of discretion standard of review." Pet. at 17. Petitioner maintains that the Court of Appeals disregarded the abuse of discretion standard and substituted "the clearly erroneous rule as to findings of fact, together with review for legal error as to issues of law." Pet. at 19. Again, petitioner has not accurately characterized the Court of Appeals' opinion. The court stated the standard of review as follows (Pet. App. 33a-34a):

> The district court has wide discretion in the exercise of its duty to supervise members of the bar appearing before it. See *Groper v. Taff*, 717 F.2d at 1418. In reviewing the court's decision, we are bound to accept the court's findings on disputed issues of fact unless they are clearly erroneous. The district court's conclusions of law, including its interpretation of the Code of Professional Responsibility, and its application of the law to the facts are of course subject to appellate review for legal error.

Thus, the court did not foreswear the abuse of discretion standard. The court simply recognized that the trial court's discretion is not boundless. A trial court does not have discretion to disqualify an attorney for any reason whatsoever. Its discretion begins only when there exist facts that, applied to the controlling legal standard, establish that disqualification is a course of action available to the district court in the exercise of its discretion. The purport of the Court's opinion is simply that when the power of a trial court to exercise discretion depends on a finding of fact or a conclusion of law, then the former is subject to review under the clearly erroneous standard and the latter is subject to review for legal error.

That result is hardly surprising. As this Court stated in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982):

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from [that standard of review].

And, it is elementary that the interpretation of a rule, for example a Disciplinary Rule of the Code of Professional Responsibility, should be reviewed on the basis of legal error—*i.e.*, whether or not the interpretation is correct. A trial court is not given discretion to interpret such rules; the rules have a meaning, and the trial court's conclusion as to that meaning is either correct or incorrect.

Thus, the dichotomy created by petitioner between courts applying an abuse of discretion standard, on the one hand, and others applying the clearly erroneous rule for issues of fact and the legal error rule for issues of law, on the other hand, is a false one—as is the conflict in the circuits that petitioner asserts.[8] Again, the issue

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[8] The cases cited by petitioner as in conflict with the decision below are in fact entirely consistent with that decision. See, *e.g.*, *Paul E. Iacono Structural Engineering, Inc.* v. *Humphrey*, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 104 S. Ct. 162 (1983) ("we will not reverse the district court unless the court either misperceives the relevant rule of law . . . or abuses its discretion"); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 131-135 (2d Cir. 1976) (court states standard is "abuse of discretion" and then goes on to analyze whether trial court correctly applied the governing legal standards and ethical rules); *Redd* v. *Shell Oil Company*, 518 F.2d 311, 314-315 (10th Cir. 1975) (court states standard is "judicial discretion" and then sets forth the legal standards which must be met as a

petitioner would present is not raised in this case, and in any event does not merit this Court's attention.

4. Petitioner's fourth question presented is whether attorney disqualification orders in civil cases are subject to immediate appeal. In our view, there is no reason for the Court to review that question at this time. The result below on this point is in line with the uniform view of the other ten circuits that have decided the point.[9] That result is, as we show below, entirely consistent with this Court's decision in *Flanagan*. And, the result is crucial if the judicial system is to be able to deal with the massive disruptions and harassment that flow from the

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predicate to exercise of that discretion). But cf., *Kevlik* v. *Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984) (*dictum* suggesting that abuse of discretion standard and clearly erroneous standard are mutually exclusive).

[9] The Ninth Circuit, having correctly anticipated the holding in *Flanagan* with respect to criminal cases, *United States* v. *Greger*, 657 F.2d 1109 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1891 (1983) (disqualification orders in criminal cases not immediately appealable), reached the opposite conclusion with respect to civil cases, *Gough* v. *Perkowski*, 694 F.2d 1140, 1141-45 (9th Cir. 1982) (disqualification orders in civil cases immediately appealable). See also, the following decisions holding disqualification orders in civil cases immediately appealable: *Armstrong* v. *McAlpin*, 625 F.2d 433, 437-41 (2d Cir. 1980) (*en banc*), *vacated on other grounds*, 449 U.S. 1106 (1981); *Interco Systems, Inc.* v. *Omni Corporate Services*, 733 F.2d 253 (2d Cir. 1984) (post-*Flanagan*); *International Business Machines* v. *Levin*, 579 F.2d 271, 277-78 (3rd Cir. 1978); *Aetna Casualty & Sur. Co.* v. *United States*, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978); *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1024-27 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981); *General Mill Supply Co.* v. *SCA Serv., Inc.*, 698 F.2d 704, 706 (6th Cir. 1982); *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d 715, 718-20 (7th Cir. 1982); *In re Multi-Piece Rim Prod. Liab. Litig.*, 612 F.2d 377, 378 (8th Cir. 1980), *vacated on other grounds sub nom. Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981); *Norton* v. *Tallahassee Memorial Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982); *Ah Ju Steel Co.* v. *Armco, Inc.*, 680 F.2d 751, 752-53 (C.C.P.A. 1982).

trend toward abuse of motions to disqualify attorneys in large civil cases.

a. *Flanagan* rests heavily on factors that arise only in the context of criminal litigation. The *Flanagan* Court re-emphasized that the "'policy [disfavoring pre-judgment appeals] is at its strongest in the field of criminal law,'" 104 S.Ct. at 1054 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)); *see also* 104 S.Ct. at 1057 ("exceptions to the final judgment rule in criminal cases are rare"). Unlike a civil litigant, the criminal defendant is guaranteed a speedy trial by the Sixth Amendment. In addition, "there is a societal interest in providing a speedy trial" in criminal cases. *Id.* at 1054 (quoting *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972)). That societal interest derives, *inter alia*, from a concern for "the prosecution's ability to meet its burden of proof," from "the cost of pretrial detention," from "public anxiety over community safety," and from the community's "strong collective psychological and moral interest in bringing the person responsible to justice"—all of which are adversely affected by undue delay before trial. 104 S.Ct. at 1054. Because of these interests, "the Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Id.* at 1055. But these interests provide no reason to reverse the established rule that disqualification orders in *civil* cases are immediately appealable.

b. Beyond these general considerations, the heart of the analysis in *Flanagan* turns on a factor not present in civil cases. The defendants in *Flanagan* attacked the disqualification of their lawyers on two constitutional grounds: "their Sixth Amendment right to assistance of counsel and . . . their Fifth Amendment due process right to present a common defense through joint counsel." 104 S.Ct. at 1053. It was clear that these constitutional challenges could be asserted on appeal after a con-

viction as grounds to set aside the conviction. The constitutional rights asserted in *Flanagan* are, "like virtually all rights of criminal defendants, merely [rights] not to be convicted under certain circumstances." 104 S.Ct. at 1056.

The *Flanagan* Court did not determine the elements of the showing a criminal defendant would have to establish in order to upset a conviction on either of these grounds. The Court decided that whatever the elements of these constitutional claims, one or more of the conditions for immediate appealability would not be satisfied.[10] If these rights are like other Sixth Amendment rights, "[o]btaining reversal [of a conviction] for violation of such a right [would] not require a showing of prejudice to the defense, since the right reflects constitutional protection to the defendant's free choice independent of concern for the objective fairness of the proceeding." 104 S.Ct. at 1056. On that assumption, "a pretrial order violating the right does not meet the third condition for coverage by the collateral order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" *Id.* The *Flanagan* Court continued:

> If, on the other hand, [the] right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order [in a criminal case] still falls outside the coverage of the collateral order exception. . . .
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> On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. . . . In these circumstances the second . . . condition for immediate appealability as a collateral order is not satisfied: the disqualification order does not resolve an "issue completely separate from the merits of the action." [*Id.* at 1056-57].

[10] The three conditions for immediate appealability under the collateral order exception are set forth in *Flanagan*, 104 S.Ct. at 1055:

> . . . First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978) (footnote omitted).

The critical point here is that the premise of both of these alternative analyses in *Flanagan* was the existence of a basis—a right rooted in the Constitution—on which a criminal defendant could challenge the disqualification of his counsel as a ground to overturn a criminal conviction. *Id.* at 1055-56. There is, however, no analogous right in the civil context. Pretrial disqualification of counsel does not provide a civil litigant a means to overturn an adverse or unsatisfactory judgment on the merits of a case.

In a civil case, "[t]he fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since . . . there is no presumption of prejudice which attaches to such disqualification." *Gough* v. *Perkowski*, 694 F.2d at 1143. And, our research has failed to disclose a single case where a court has even considered, much less approved, a contention that a civil judgment should be overturned because a party's ability to put on his case was prejudiced by an order disqualifying his chosen counsel. The courts that have speculated on such a ground for a post-judgment appeal in a civil case have uniformly concluded that a post-judgment inquiry into prejudice would be "an exercise in futility" for the parties, *Freeman* v. *Chicago Musical Instrument Co.*, 689 F.2d at 719, and "would impose an unrealistic burden on the courts," *Gough*, 694 F.2d at 1144. *Accord, e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d at 441 ("an almost insurmountable burden"); *Duncan* v. *Merrill Lynch*, 646 F.2d at 1025-27. These decisions have recognized that such an appeal would necessarily turn on the subjective and standardless question whether disqualified counsel

would have conducted the trial in a sufficiently superior manner to the performance of substitute counsel as to have altered the outcome of the litigation.[11] Thus, if post-judgment appellate review of an order disqualifying counsel in a civil case were permitted, "[t]he argument in most cases would quickly degenerate into speculation and hindsight, and a proper decision would be extremely difficult, if not impossible, to arrive at." *Gough*, 694 F.2d at 1144.[12]

For these reasons, and for others detailed in the margin,[13] the courts of appeals have uniformly reached the

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[11] Of course, if substitute counsel's performance were so poor as to constitute malpractice, his client would have a basis for a civil tort action against him, not a ground for appeal.

[12] As the *Gough* Court stated:

> Most able lawyers, given a chance to review the results of their initial efforts, could discover ways in which they might have improved on their performance. . . . More important, almost any attorney, knowing the outcome of all the twists and turns of a hotly litigated matter, could tell anyone interested how he would have tried the case and won it had he been the trial lawyer rather than someone less talented or creative. Yet, if appeals are delayed until after trial, courts would be required to deal with precisely that sort of *post hoc* rationalization in every case. [*Id.*]

[13] There are other reasons for concluding that a post-judgment appeal from a disqualification order in a civil case could not adequately protect the rights of the parties involved:

First, unlike a criminal defendant, a plaintiff in a civil case might "prevail," yet obtain a smaller verdict than his chosen counsel would have recovered. That injury, however, could not realistically be reviewed on appeal from a final judgment; to even attempt to measure the effect of an attorney's disqualification on the amount of the relief awarded would "plunge[] [the appellate court] into a morass of speculation." *Gough* v. *Perkowski*, 694 F.2d at 1144-45.

Second, even if his former client prevails, the improperly disqualified attorney "is not likely to find any remedy for the damage to his reputation or to his pocketbook." *Duncan* v. *Merrill Lynch*, 646 F.2d at 1027; *accord, e.g.*, *Freeman* v. *Chicago Musical Instrument*

conclusion stated by the court below (Pet. App. 30a): "[i]t is clear that there can be no effective review at the end of the case." See the cases cited in note 9 *supra*. The reality, recognized by these decisions, is that improper pretrial disqualification of counsel is not a ground for setting aside a judgment in a civil case. *Flanagan* does nothing to alter that conclusion.

Thus, unlike *Flanagan*, this case meets the central requirement for departure from the final judgment rule: "observance of [the rule] would practically defeat the right to any review at all." 104 S. Ct. at 1055 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940)). As there is no post-trial challenge to attorney disqualification in a civil case, here, unlike *Flanagan*, the second and third conditions for a pre-trial appeal are clearly met. As to the second condition, the reasoning of the *Flanagan* court has no application here. If an element of establishing deprivation of a constitutional right is prejudice at trial, courts must confront the issue of prejudice in that context, and as *Flanagan* points out, determination of that issue could not be made until after trial.[14] But, in a civil case, prejudice at trial has never been a necessary element of a showing that counsel has been improperly disqualified. The questions in this case, for example, do not depend on a showing of prejudice and are wholly distinct from the issues

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Co., 689 F.2d at 720. Unlike the field of criminal defense, where contingent fees are prohibited, Code of Professional Responsibility DR 2-106(C), many civil cases are undertaken on a contingent basis as a matter of financial necessity. The erroneous disqualification of an attorney in a contingency case, and the substitution of other counsel, may well destroy the disqualified attorney's hope of ever obtaining any compensation for the work, which as here may be of massive quantity, that he has put into a case.

[14] In the circumstances of *Flanagan*, where the defendants claimed a right to be jointly represented by counsel, the possible prejudice at trial could derive from other sources than simply the quality of substitute counsel's trial performance.

at trial. "The issue whether counsel [in a civil case] should be disqualified is completely separate from the merits of the suit." *Gough* v. *Perkowski*, 694 F.2d at 1142. In a civil case, an order disqualifying counsel does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). Therefore, a disqualification order in a civil case satisfies the second criterion for immediate appealability.

And, as to the third condition, unlike a criminal case where the Sixth Amendment provides a means to obtain post-conviction review, an order disqualifying counsel in a civil case is effectively unreviewable on appeal from a final judgment. *Flanagan*'s recognition that the Sixth Amendment provides such a means in a criminal case does not affect this practical reality in civil cases.

c. This Court "has long given [the final judgment rule] a practical rather than technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. at 546. As we have already discussed, the Court in *Flanagan* was concerned with the deleterious practical effects of permitting pre-trial appeals of disqualification orders in criminal cases. In the civil context, significant harm to the judicial process and to civil litigants would result if pre-trial appeals were *not* permitted.

The court below succinctly described the dangers (Pet. App. 27a, 57a):

> . . .The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. *See, e.g.*, *Board of Education of New York City* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum* v. *Historic Figures, Inc.*, 501 F. Supp. 326, 331 (D.D.C. 1980), *aff'd sub nom. National Souvenir Center, Inc.* v. *Historic Figures, Inc.*, Nos. 82-2329, *et al.*, slip op. at 27-28 (D.C. Cir. Feb. 10, 1984); Crocker, "The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest," 1979 Duke L.J. 1310; Comment, 45 U. Chi. L. Rev. 450 (1978). We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game.
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> The disruption and delay of proceedings on the merits, such as we have seen in this case, are unhappily foreseeable byproducts of the injudicious use of disqualification motions by opposing counsel. We fear the intrusive potential of such motions would be exacerbated were orders disqualifying counsel not immediately appealable. In complex, costly product liability cases of this type, the plaintiff may have no realistic or comparable alternative to current counsel; counsel are not fungible.

The actions of the petitioner in this case are illustrative. Why did petitioner devote massive and expensive resources to the time-consuming effort to have Allis and Butler disqualified by the lower court? Why has petitioner sought review of the Court of Appeals' decision in this Court? The answer is that petitioner has already gained a lengthy delay in the proceedings on the merits, has become privy to privileged communications between the Kollers and their lawyers, and still retains the hope that it may yet separate the Kollers from the counsel of their choice—the only lawyers on the plaintiffs' side who have done the massive work necessary effectively to try this complex case. If the decision of the court below is

not left to stand, and appellate review in other cases is not permitted, tactics like those of petitioner here will be encouraged. And, the judicial process and civil litigants will pay the price.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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